BAYER (M) SDN BHD

v.

RUGAYAH PARMAN

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-04-62-1996]
20 MARCH 2000

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Award of Industrial Court - High Court refusing to quash award - Whether award jurisdictionally flawed*

This was an appeal against the decision of the learned judge refusing to issue *certiorari* to quash an award of the Industrial Court. The facts were that the respondent, who was employed by the appellant, had considered herself dismissed from service when the appellant had deprived her of work over a period of time. The matter of the respondent's dismissal was then referred to the Industrial Court, whereupon the tribunal ruled that the respondent had been constructively dismissed from her employment. The appellant applied for *certiorari* to quash the award, but judicial review was refused by the learned judge. The appellant appealed to the Court of Appeal. *Inter alia,* the appellant argued that the learned judge ought to have quashed the award as the same was jurisdictionally flawed.

Held:
Per Gopal Sri Ram JCA:

[1] The findings of the Industrial Court upon the issue of whether the respondent had been dismissed without just cause or excuse were based upon on the facts it perceived founded upon the testimony it believed. The Industrial Court did not commit any jurisdictional error in the wider *Anisminic* principle. Nor did it go outside the pleaded issues.

[2] The learned judge had carefully directed himself on the law he was required to apply to the application before him. He was entirely right in refusing to interfere with the award of the Industrial Court.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini merupakan rayuan terhadap keputusan hakim yang bijaksana yang enggan untuk mengeluarkan *certiorari* untuk membatalkan suatu award Mahkamah Perindustrian. Fakta-faktanya adalah bahawa responden, yang telah diambil bekerja oleh perayu, telah menganggapkan dirinya diberhentikan daripada perkhidmatan apabila perayu telah tidak lagi memberi beliau kerja bagi satu jangka masa. Perkara pemecatan responden telah kemudiannya dirujuk kepada Mahkamah Perindustrian, di mana pihak tribunal telah memutuskan bahawa responden telah diberhentikan secara konstruktif daripada pekerjaannya. Perayu telah memohon untuk mendapatkan *certiorari* bagi mengetepikan award tersebut, tetapi kajian semula kehakiman telah ditolak oleh hakim yang bijaksana. Perayu telah merayu kepada Mahkamah Rayuan. Antara lainnya, perayu telah berhujah bahawa hakim yang bijaksana seharusnya telah membatalkan award tersebut kerana ianya cacat di sisi bidangkuasa.

Diputuskan:
Per Gopal Sri Ram HMR

[1] Keputusan Mahkamah Perindustrian mengenai isu samada responden telah diberhentikan tanpa sebab atau alasan yang adil adalah berdasarkan pada fakta-fakta yang ianya lihat berasaskan testimoni yang dipercayainya. Mahkamah Perindustrian tidak melakukan sebarang kesilapan bidangkuasa menurut prinsip *Anisminic* yang lebih luas. Ianya juga tidak terkeluar daripada isu-isu yang diplidkan.

[2] Hakim yang bijaksana telah dengan jelas mengarahkan dirinya atas undang-undang yang beliau dikehendaki memakainya kepada permohonan di hadapannya. Beliau sesungguhnya telah bertindak dengan betul dalam menolak untuk mengganggui award Mahkamah Perindustrian tersebut.

[Rayuan ditolak.]

Case(s) referred to:
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 ***(refd)***
Quah Swee Khoon v. Sime Darby Bhd (Civil No: W-02-659-98) ***(refd)***
William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20

For the appellant - TM Varughese; M/s TM Varughese & Co
For the respondent - LG Seah; M/s Lobo & Assoc

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-25-122-1995]

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

The complaint in this appeal is that *certiorari* was wrongly declined by the learned judge in the court below to quash an award of the Industrial Court granting relief to the respondent. The factual matrix relating to this appeal is as follows.

At all material times, the respondent was employed by the appellant as a computer programmer. She commenced employment on 1 December 1986.

The respondent's case in the Industrial Court was that she had been progressively deprived of work over a period of time and marginalised in her employment. According to her, there came a time when she really had nothing to do. To add insult to injury, she was prevented from having access to the programming room and her computer ruler was taken away from her.

Finding herself having no work to do, she employed her time reading the Holy Quran. This appears to have irked the appellant. By a letter dated 4 December 1991, the respondent was asked to show cause as to why she was not doing any work but was instead reading a book. According to this letter, the acts of the respondent amounted to insubordination. The respondent replied by letter dated 11 December 1991. In that letter she raised a number of matters in respect of which she expressed her unhappiness. She concluded in the following terms:

> Under these circumstances, unless the Company rectify matter and give me my normal work as Programmer by 20/12/1991, I will have no alternative but to consider myself dismissed by the Company with effect from 21/12/1991.

The appellant's response was contained in a letter dated 13 December 1991. It is an important document. For that reason we will reproduce it in its essential contents. This is what it says:

> We refer to our memo of 4th December 1991, requiring you to furnish an explanation in writing with regards to your misconduct committed on the 13th November 1991 in the EDP office.
>
> Your letter of reply dated 11th December 1991 to Mr. K Herzer not only failed to give an explanation for your misconduct as required but also showed no remorse for the wrong committed. The Company views your threat to leave your service with the company by 21/12/1991 as an attempt to leave your service without giving proper notice to the company.

> Under such circumstances, the Company shall proceed to institute disciplinary proceedings against you. A domestic inquiry will be held on you on 23rd December 1991 at 10.00 a.m. in the Office Meeting Room. The charges against you are shown on the charge sheet attached herewith. You are required to attend the inquiry to answer the charges. You may call witnesses and produce other evidence to defend yourself. However, should you fail to be present, the inquiry shall proceed in your absence.

Pausing for a moment, it is of interest to note; and this was drawn to the attention of counsel by Mr. Justice Haidar during argument; that this letter does not purport to be a reply to the complaint raised in the respondent's earlier letter of 11 December 1991. The respondent faced with the ultimatum given by the appellant to face disciplinary proceedings made good her word. She left the appellant on 13 December 1991. She then lodged a complaint with the Director General of Industrial Relations and set in motion the procedure prescribed by s. 20 of the Industrial Relations Act 1967.

Eventually the dispute between the appellant and respondent was referred by the Honourable Minister to the Industrial Court. After a hearing lasting several days, the Industrial Court found for the respondent. It held that she had been constructively dismissed from her employment. Surprisingly, it found the respondent to have contributed to the events that led to her dismissal. However, there was neither a cross appeal nor a cross application by the respondent to have that part of the award corrected. Although Ms Seah for the respondent contended that it was open for us now to put the matter right, we would respectfully decline to do so on the ground this is not an appropriate case for intervention. All that therefore remains before us, is the appellant's complaint that the award was jurisdictionally flawed and that the learned High Court judge ought to have quashed it.

We have very recently in the unreported case of *Quah Swee Khoon v. Sime Darby Bhd* (Civil No: W-02-659-98) dealt with what amounts to a constructive dismissal. We do not propose to repeat what we there said. Suffice to say in the instant case, the findings of the Industrial Court upon the issue of whether the respondent had been dismissed without just cause or excuse were based upon on the facts it perceived founded upon testimony it believed. We have repeatedly said that judicial review proceedings ought not be used as a cloak to exercise appellate powers: see *William Jacks and Co. (M) Sdn Bhd v. S. Balasingam* [1997] 3 CLJ 235; [1997] 3 AMR 2585.

We have hearkened to the submission urged on us by Mr. T.M Varughese, of counsel for the appellant. We have according to his advice subjected the judgment to careful scrutiny. So too the award. Having done, so, we are entirely satisfied that the Industrial Court did not commit any jurisdictional error in the wider *Animinic* sense. See *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317. Nor did it go outside the pleaded issues. We particularly dissent from the arguments of Mr. Varughese that this is a case where the Industrial Court decided on issues not raised in the pleadings before it. As we have said, it did not.

The learned judge carefully directed himself on the law he was required to apply to the application before him. In our judgment, he was entirely right in refusing to interfere with the award of the Industrial Court. We think that this appeal is really quite hopeless. It must be dismissed. The appellant will pay the costs of this appeal. The deposit shall be paid to the respondent to account of her taxed costs.